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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeals from the United States District Court for the District of Utah

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO AS AMICI CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO AS AMICI CURIAE IN SUPPORT OF APPELLEES

This brief *amicus curiae* is filed with the consent of the parties as provided for in the rules of the Court.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 91 national and international unions with a total membership of approximately 13,000,000 working men and women. The Service Employees International Union ("SEIU") is a labor union affiliated with the AFL-CIO which represents approximately 850,000 workers, principally in the service industries. A primary interest of the AFL-CIO and the SEIU is to secure employment opportunities for working people without regard to race, religion, sex or national origin, an interest that is threatened in part by the broad exemption now contained in § 702 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-1. The AFL-CIO and SEIU files this brief to argue that § 702's exemption of the non-religious activities of religious organizations from the ban on religious discrimination is inconsistent with the Establishment Clause of the First Amendment.

ARGUMENT

INTRODUCTION AND SUMMARY

From its enactment in 1964 until 1972, Title VII's ban on religious discrimination in employment applied to the non-religious activities of religious organizations; those institutions were afforded an exemption from the ban on religious discrimination only with respect to their "religious activities."[1] In 1972, Congress amended § 702 to remove the word "religious" as a modifier of "activities," thereby exempting religious organizations from the ban on religious discrimination as to "*all* their activities'. S. Conf. Rep. 92-681, 92d Cong., 2d Sess. 16 (1972) (emphasis added); *see also*, 118 Cong. Rec. 7167 (1972)

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[1] Throughout this brief we use "religious organization" and "religious institution" to refer to the category of institutions granted exemption by § 702, *viz.*, a "religious corporation, association, educational institution, or society."

(section-by-section analysis of bill reported by the conference committee).

As thus amended, § 702 allows religious organizations to discriminate in employment on the basis of religion even when those organizations operate commercial businesses for profit and would readily concede that the businesses do not constitute religious activity and that no religious tenet or belief calls for such discrimination. As Representative Erlenborn advised the House in discussing the conference report on the 1972 amendments to Title VII:

> [I]t was clearly the thought of the conference that if a religious institution is engaged in a profit making venture they still are not covered by the provisions of this act. [118 Cong. Rec. 7567 (1972)]

The practical impact of this amendment on the job opportunities of America's workers is substantial. While there is no comprehensive published accounting of the commercial enterprises operated by religious organizations, it is apparent from such information as is available that this phenomenon is widespread. *See generally*, A. Balk, *The Religion Business*, 8-11 (1968); M. Larson & C. Lowell, *The Religious Empire* (1976); S. Rep. No. 91-552, 91st Cong. 2d Sess., 1969 U.S. Code Cong. & Ad. N. 2096; H. Rep. No. 91-413, 91st Cong. 2d Sess., 1969 U.S. Code Cong. & Ad. N. 1692.

This Court's opinion in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 299 (1985), shows, to take one example easily at hand, that one small religious foundation operated 38 commercial businesses in four states, including "service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a record-keeping company, a motel, and companies engaged in the production and distribution of candy." *Id.* at 292 & n.2.

The Mormon Church, appellant in No. 86-179, has moreover, been reported to own and operate three television and twelve radio stations, a group of insurance

companies, a department store, a number of hotels, a tourist resort, 650 poultry and dairy farms, a sugar company, 30 canneries, a soap factory, a coal mine, a flour mill, and five salvage processing plants,[2] and to be one of the largest employers in Salt Lake City and the State of Utah.[3]

The Mormon Church, to be sure, states in its brief that the Church does not impose a religious preference with respect to employment in its profit-making activities (C.P.B. Br. 4). But the salient point here is that § 702 allows, and the Church would be free to practice, such discrimination were § 702 held constitutional. Nor, in any event, is there any assurance that other religious institutions have adopted policies as benign or that such policies would be continued were this Court, in contrast to the lower court decisions to date, to uphold § 702's expanded exemption.

The instant case involves a non-profit gymnasium, and the parties understandably have focused their discussions on that enterprise. But the holding sought by appellants —an unqualified affirmation of the constitutionality of § 702 in all its applications—involves considerations that transcend the facts of this case.[4] While, as we explain

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[2] J. Heinerman & A. Shupe, *The Mormon Corporate Empire*, 46-124 (1985); M. Larson & C. Lowell, *Praise the Lord for Tax Exemption*, 203-210 (1968).

[3] J. Heinerman & A. Shupe, *supra*, at 92.

[4] As stated in the Brief of the United States, at (i), the question presented is:

> Whether Section 702 . . . is invalid under the Establishment Clause of the First Amendment to the extent that it exempts the secular activities of [religious] organizations from the prohibition against religious discrimination.

The Mormon Church, in its brief, at (i), states the question with equal breadth:

> 1. Whether Congress acted unconstitutionally when it amended [§ 702] . . . to permit religious employers to hire only members of their own faith, regardless of the nature of the employment activity . . . .

herein, we believe § 702 unconstitutional in its exemption of this gymnasium, a major purpose of our brief is to underline the broader ramifications of § 702's exemption of commercial enterprises of all kinds owned by religious organizations.

Preliminarily, we wish to make clear that we do *not* suggest the exemption originally enacted in 1964 suffered from any constitutional infirmity. The exemption of "religious activities" of religious institutions from a statutory ban on religious discrimination is plainly required in some instances by the Free Exercise Clause, and in all instances is appropriate "to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'" *Gillette v. United States*, 401 U.S. 437, 453 (1971), quoting *United States v. Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting). The same is not true, however, when Congress extends the exemption to nonreligious activities.

We begin our analysis by addressing the United States' contention (U.S. Br. at 37-38) that the Establishment Clause is not implicated at all in this case, because there is no "state action." The United States asserts that a congressional decision "not to exercise its regulatory authority . . . cannot offend the Establishment Clause" (*id.* at 38). But as we show at pp. 7-9, this Court has repeatedly rejected the notion that the Establishment Clause does not reach religious exemptions from general government-imposed norms. The central purpose of the Establishment Clause is to assure government *neutrality* respecting religion. The exemption of religious organizations from a statutory obligation imposed upon all secular organizations is, on its face, a departure from that neutrality, and its permissibility under the Establishment Clause thus turns on whether there exists an adequate secular justification vindicating the differential treatment.

We then turn to the three "secular" justifications for the blanket § 702 exemption advanced in appellants' briefs. At pp. 9-12, we demonstrate that the Mormon Church's contention that the Free Exercise Clause *requires* this sweeping exemption—a contention disclaimed by the United States—is without merit. With respect to most of the non-religious activities of religious institutions, the threshold requirement for invoking the Free Exercise Clause—a showing that the governmental regulation collides with religious belief or practice—will be wholly absent. Indeed, in this case the district court stated that it had not even been contended, let alone shown, that employing non-Mormons or non-observing Mormons in the gymnasium would conflict with any religious tenet of the Church.

This same consideration impeaches the second theory advanced in defense of § 702: that the exemption, even if not required by the Free Exercise Clause, is an allowable accommodation of "free exercise values," freeing religious belief or practice from the burdens that government regulation otherwise would impose. As we show at pp. 12-16, that justification for non-neutrality requires, at the threshold, a demonstration that absent the exemption the government regulation would conflict with religious belief or practice. And here, as in most cases of non-religious activity, that threshold is not present.

The final justification asserted by appellants for the blanket exemption in § 702 is that it avoids the "entanglement" between government and religious institutions incident to resolving disputes over whether particular activities are religious or secular, and avoids as well the risk that erroneous resolutions of such disputes will impinge on true religious activity. But as we show at pp. 16-20, whatever the legitimacy of these concerns in marginal cases, § 702's exemption is vastly overbroad in relation to these concerns. For a vast array of commercial enterprises run by religious organizations,

the conclusion that the activity is secular will be crystal-clear and likely not disputed. And the religious-secular line has already been determined for most activities of religious institutions by virtue of other tax and employment statutes whose exemptions—like that in the 1964 version of § 702—apply only to religious activities. There will thus be relatively few instances where the ban on religious discrimination in Title VII would generate a dispute over this line of demarcation. Against this background, § 702's general exemption in favor of *all* the activities of *all* religious institutions cannot be justified by concerns that are applicable only in *marginal cases* and that could be dealt with (as we show) by techniques that cut less deeply into core Establishment Clause values.

I. THE ESTABLISHMENT CLAUSE REACHES RELIGIOUS EXEMPTIONS FROM GOVERNMENT-IMPOSED NORMS

The United States contends that the complete answer to the Establishment Clause challenge to § 702's blanket exemption for religious organizations is that the freedom of such organizations to discriminate is "not the result of an affirmative grant of authority by Section 702 or any other federal statute" (U.S. Br. 37).

> Prior to the enactment of Title VII, *all* private employers were free to discriminate on the basis of religion; Section 702 simply exempts religious organizations from the antidiscrimination requirement of Title VII . . . . Since Congress' failure to prohibit discrimination prior to 1964 did not constitute an establishment of religion, its decision not to prohibit such discrimination now cannot offend the Establishment Clause. [*Id.* at 37-38, emphasis in Br.]

This argument overlooks the singular role of the Establishment Clause. Congress' choices respecting exemption from general government-imposed obligations are

ordinarily of no constitutional moment, but when the exemption runs exclusively to religious institutions the situation is quite different.

The "central purpose of the Establishment Clause" is "ensuring government neutrality in matters of religion." *Gillette*, 401 U.S. at 449, *viz.*, "to insure that no religion be sponsored or favored", *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). In consequence, "[t]he Court must not ignore that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause," *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972). "[T]he Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders', as well as obvious abuses." *Gillette*, 401 U.S. at 452.[5] When government, by exemption, frees religious institutions to engage in practices that are forbidden to all others in our society, the interests protected by the Establishment Clause are directly implicated:

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of endorsement . . . of religion, a core purpose of the Establishment Clause is violated. [*Grand Rapids Dist. v. Ball*, —— U.S. ——, 105 S. Ct. 3216, 3226 (1985)].

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[5] The Court's approach in *Walz* and *Gillette, supra*, is sufficient to demonstrate that the United States' thesis is wrong. If the exemption of church property devoted to religious purposes from a general property tax is constitutional on the simple ground that there is no government action, the Court would have had no occasion to undertake the detailed and sensitive inquiry that ultimately guided its decision in *Walz*. See also *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Gillette, supra* (confronting the constitutionality of statutes granting exemption from military conscription to conscientious objectors).

Accordingly, an Establishment Clause inquiry is triggered by the creation of an exemption which has the effect of permitting religious institutions to act in the secular world in ways that are denied to all secular institutions. That inquiry is whether there exists "a neutral, secular basis for the lines the government has drawn." *Gillette*, 401 U.S. at 452.

II. THERE IS NO ADEQUATE SECULAR JUSTIFICATION FOR THE EXTRAORDINARY PRIVILEGE PERMITTED RELIGIOUS INSTITUTIONS—BUT NO OTHERS—BY THE EXPANDED § 702 EXEMPTION

The exemption accorded by the original § 702 had a plainly secular justification, *viz.*, protection of free exercise rights. The religion of those who carry out the "religious activities" of religious organizations is obviously central to the free exercise of religious belief and practice. See p. 5, *supra*.

But when religious institutions expand their activities into the secular world, the justification for a § 702 exemption is not self-evident. The activity is by definition not religious in nature, and most often employment on the basis of religion will not be dictated by religious tenet. On what basis, then, can the government's allowance to religious organizations alone of a license to engage in employment discrimination be justified? The briefs of appellants proffer three justifications. We address these in turn and show that none constitute adequate secular justification for the privilege accorded to religious institutions—but to no others—by the expanded § 702.

A. The Blanket Exemption in § 702 Is Not Required By the Free Exercise Clause

The Mormon Church contends that the Free Exercise Clause precludes government bans on religious discrimination in the secular activities of religious organizations (C.P.B. Br. 17-32). According to the Church, as "gov-

ernment clearly can legislatively authorize any conduct which the Free Exercise Clause would compel the government to leave unregulated", the authorization here "cannot constitute an establishment of religion" (C.P.B. 17-18). The United States expressly disclaims any reliance on this theory—"We do not assert that the amendment of Section 702 to encompass all activities of religious institutions was required by the Free Exercise Clause" (U.S. Br. 17)—and with good reason. In the vast majority of cases, including *this* case, a ban on religious discrimination in the secular activities of religious organizations does not raise even a colorable free exercise claim.

"Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." *Thomas v. Review Board*, 454 U.S. 707, 713 (1981). Thus, a statute cannot violate a claimant's free exercise rights "unless, at a minimum," compliance with the statute would "actually burden[] the claimant's freedom to exercise religious rights." *Tony and Susan Alamo Foundation*, 471 U.S. at 303. *See also, Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *United States v. Lee*, 455 U.S. 252, 256-257 (1982).

Except, then, where a religious organization's tenets dictate religious hiring even in purely secular activities, a ban on religious employment discrimination in secular activities does not generate the threshold requirement for a free exercise claim. For the religious organization could not demonstrate the "minimum": that compliance with that ban would violate religious beliefs or conflict with religious practice. Thus, conformity to the Free Exercise Clause cannot constitute a justification for § 702's present blanket exemption for all secular activities of all religious organizations.

Indeed, what we have said to this point disposes of the free exercise claim on the facts of the instant case.

The gymnasium in this case operates like any other gymnasium in our society, and performs no religious mission; albeit on a non-profit basis, the facility competes for the general public's patronage against like facilities that are operated by others for profit. The district court's opinion states that "there is no evidence *or a contention* that the religious tenets of the Mormon Church involve or require religious discrimination in employment" (J.S. App. 15a; emphasis added), and "[n]one of the affidavits submitted even remotely suggest that the Mormon Church holds any religious tenet that requires all persons employed by its corporation in secular, non-religious activities to be templeworthy Mormons" (*id.* 54a).[6]

Of course, it is possible that future cases may arise in which a religious organization *does* have a religious tenet requiring the employment of only its members in secular activities. Whether Congress is required by the Free Exercise Clause to grant *such* an employer an exemption from Title VII's ban on religious discrimination is a more complex question. As that question is not presented here, we go no further then to note the principles that would govern its disposition. In such a case, as there would be a conflict between government regulation and religious belief, the inquiry would advance to the second stage, which requires balancing the interest in fidelity

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[6] The Mormon Church contends in *this* Court—but apparently not in the court below—that its religious discrimination against appellee Mayson *was* dictated by a religious tenet (C.P.B. Br. 4-5, 19-20). We are advised that appellees will respond to that contention at length, and do not undertake to duplicate that showing here. It is sufficient to observe that ambiguous and carefully guarded affidavits claiming that employment of Church members is "consistent with" Church doctrine (C.P.B. Br. 5), and that because salaries of gymnasium employees are paid "primarily" by Church members "[t]he Church believes that it should benefit members with employment possibilities in which these contributed funds are expended" (*id.* 4) are not claims that such religious discrimination is *required* by religious tenet.

to the organization's religious tenets against the governmental interest in eliminating employment discrimination. This Court's decisions show that the government's interest in banning employment discrimination is of the highest order and that free exercise interests are entitled to their least weight when they are transported to the commercial arena and the consequences are felt by employees:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. [*United States v. Lee*, 455 U.S. at 261].

It thus appears that a ban on religious discrimination would withstand a free exercise challenge even from a religious organization acting as a secular employer whose discrimination in secular employment is based on a religious tenet. But whatever the outcome in *such* a case, the Free Exercise Clause plainly does not justify the sweeping exemption in § 702 which licenses religious discrimination by religious institutions *whether or not* that discrimination is based on a religious tenet.

B. The Blanket Exemption in § 702 Cannot Be Justified As a Permissible Accommodation of Religious Practice or Belief

What we have said to this point indicates as well the fallacy in the second justification proffered by appellants: that even if the § 702 exemption for the secular activities of religious organizations is not compelled by the Free Exercise Clause, Congress was free to enact that exemption in order to accommodate "free exercise values." The accommodation principle comes into play when a law of general applicability collides with some citizens' religious practices or belief, but despite that collision the Free

Exercise Clause does not oblige the government to grant an exemption. In that setting, this Court has ruled that the government need not inevitably trample religious practice or belief simply because it is constitutionally empowered to do so, and accordingly may, in appropriate circumstances, adjust its secular legislation to mitigate the intrusion on religious practice or belief, *viz.*, to accommodate "free exercise values" by avoiding "unnecessary clashes with the dictates of conscience." See *Walz, supra; Gillette, supra; Braunfeld v. Brown*, 366 U.S. 599, 608 (1961) (dictum).

The tenets of most religious organizations do not require religious hiring in secular employment. Where that is true the threshold for accommodation—a governmental desire to lift the burden that generalized legislation otherwise would impose on *religious belief or practice*—is absent; there is, *as to them*, no free exercise value to accommodate. Accordingly, § 702's blanket exemption for all secular activities of all religious organizations cannot be justified on an accommodation rationale.

The Mormon Church argues for a new and different kind of "accommodation": that government should be free to accommodate religious institutions *as such*, by exempting those organizations from general legislation even when they enter the secular world of commerce and even when there is no conflict with religious practice or belief. (C.P.B. Br. 24-25). That thesis has no support in this Court's decisional law, and, we submit, conflicts with the core purpose of the Establishment Clause. For the essence of the neutrality commanded by the Establishment Clause is that government not favor religious institutions *as such*. Where an accommodation does not safeguard religious practice or belief, the type of favoritism the Establishment Clause is designed to forbid is precisely what results from a blanket exemption of religious organizations as such from the duties imposed on all others in the secular commercial world.

The Mormon Church purports to find support for its thesis in *Walz*. But while the Court upheld an exemption for religious institutions, it did so *solely* upon finding that the exemption eliminated a conflict between general legislation and religious *practice*. The property tax exemption at issue in *Walz* did not apply to church property used for secular purposes; it extended *only* to "religious properties used solely for religious worship", 397 U.S. at 666. And the exemption was upheld precisely because the state was accommodating "the exercise of religion" by sparing that exercise from a government-imposed financial burden.

> We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions. [*Id.* at 673].

Even then, the fact that the exemption in *Walz* ran to religious organizations as such—and thus cut closer to the core of Establishment Clause concern than exemptions running to an individual's religious practice—caused this Court to temper its holding in a manner that has not been deemed necessary when upholding accommodations favoring individuals: the Court placed heavy emphasis on the fact that "churches as such" were not "singled out", but rather were bracketed with other nonprofit institutions:

> [New York] has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. [*Id.* at 673].

See also NLRB v. Catholic Bishop, 440 U.S. 490, 518 n.11 (1979) (dissenting opinion of Brennan, J., joined by White, Marshall and Blackmun, JJ.).

In sum, the accommodation doctrine cannot justify *en toto* the sweeping exemption in § 702—which operates

without concern for religious practice or belief—nor can that doctrine justify an exemption on the facts of this case (where the discrimination was not dictated by religious tenet).

It remains true, of course, that there may be instances where a particular religious institution's religious tenets *do* dictate discrimination in secular employment. Whether the government is free to accommodate such tenets by exempting tenet-based employment discrimination in non-religious activities from an otherwise general statutory ban is a question of considerable delicacy. This Court has never addressed in any context the government's power to accommodate the religious beliefs of religious institutions when those institutions choose to enter the secular world as employers. The declaration in *United States v. Lee*, 455 U.S. at 261—"[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity"—suggests that accommodation is more questionable in this context than in the more parochial settings in which it heretofore has been upheld. *Lee* indicates too that an accommodation that enables the religious institution to use its leverage as commercial employer to impose its religious beliefs on its employees is particularly questionable. *See* 455 U.S. at 261. Moreover, the accommodation of the tenets of religious *institutions*, without a concomitant accommodation of the same religious tenets when held by *individual* employers, bespeaks a preference for religious *institutions* (rather than religious beliefs) that impinges on core Establishment Clause concerns.

While we thus believe that the limits of permissible accommodation would be exceeded even by judicially narrowing § 702's exemption to tenet-based discrimination, resolution of this issue ought to await a case in which it

is squarely presented, *viz.*, in which the discrimination at issue is tenet-based.[7] What is important for now is that, whatever the outcome in *such* a case, the accommodation doctrine plainly does not justify the sweeping exemption in § 702 of discrimination by religious institutions *whether or not* that discrimination is based on religious tenet.

C. The Blanket Exemption in § 702 Is Not Justified By Concerns for Avoiding the "Entanglement" Incident To Resolution of Disputes Over Whether Particular Activity is "Religious" and for Providing a "Prophylactic" Against Erroneous Decisionmaking

Appellants assert two related justifications for the expansion of the § 702 exemption, both resting on the point that in its absence the courts would be called upon to determine which activities of religious institutions are "religious" and which are not: first, that the very process of judicial decisionmaking entails a degree of "entanglement" between the government and religious institutions that Congress is free to pretermit by a blanket exemption; and second, that as decisionmaking inevitably carries with it the risk of error, Congress is free to enact a blanket exemption as a prophylactic against erroneous judicial intrusions upon what is truly religious activity.

Although it is doubtful that these concerns were in the mind of the Congress that expanded the § 702 exemption,[8] it cannot be gainsaid that these concerns

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[7] The Court in *Lee* expressly refrained from deciding a somewhat similar accommodation issue, 455 U.S. at 260 n.11.

[8] Both appellants attribute these concerns to Congress, citing statements of Senator Ervin (U.S. Br. 16-17; C.P.B. Br. 26-28). But most of the statements upon which they rely were made by Senator Ervin in support of an earlier proposed amendment—to exempt religious institutions from Title VII entirely—that was overwhelmingly defeated. Moreover, it is clear when those statements are read in context that Senator Ervin was not complaining that line-drawing between secular and religious activities would be

might conceivably have some weight when the focus is on an activity that falls close to the line between religious and secular, and when the answer has not already been derived from an inquiry that Congress directed pursuant to some other federal statute. But as a justification for the blanket exemption in § 702 these concerns fall woefully short. Put another way, that exemption is vastly overbroad if this is the only secular justification that can be offered.

To begin with, for a broad array of commercial enterprises run by religious organizations, the conclusion that the activity is secular and implicates no religious tenets will be crystal clear—indeed, will likely not be contested by the organization. Congress knew full well in 1972 that commercial enterprises of this character abound; indeed, Congress had amended the Internal Revenue Code three years earlier to tax the unrelated business income of churches precisely because this is so. S. Rep. No. 91-552, *supra;* H. Rep. No. 91-413, *supra.* By reason of that amendment to the tax code, while 26 U.S.C. § 501(c)(3) still grants an exemption, *inter alia*, to institutions operated for "religious . . . purposes", 26 U.S.C. § 511(a) imposes a tax on their "unrelated

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entangling or susceptible to error, but that it would be "impossible" because as a theological matter *all* activities of religious organizations are "religious." That theological contention commanded 25 votes; 55 Senators found it unconvincing. 118 Cong. Rec. 1995 (1972). The United States' assertion that as Senator Ervin supported both amendments his statements in support of the one that was defeated are "relevant in ascertaining the purpose of the exemption that was adopted by Congress" (U.S. Br. 16 n.8) is, to say the least, a *non-sequitur.* The lone arguably pertinent statement by Senator Ervin in support of the amendment that was adopted was that its purpose was "to take the political hands of Caesar off the institutions of God, where they have no place to be." 118 Cong. Rec. 4503 (1972). We do not presume to guess whether that statement was meant to be an articulation of the concerns about line-drawing advanced by appellants, or a reiteration of Senator Ervin's theological view.

business taxable income," which 26 U.S.C. § 513 defines as that emanating from a

> trade or business the conduct of which is not substantially related (aside from the need of such [religious] organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its . . . purpose or function constituting the basis for its exemption under Section 501 . . .

Every religious institution—or, at least, every such institution that claims a tax exemption for its members' donations—thus identifies annually those of its profit-making enterprises that are not religious in character, as well as a substantial portion of its non-profit activities.[9] At least as to those there is no conceivable "entanglement" or "prophylactic" rationale for an exemption from § 702, and that rationale cannot justify a favoritism toward religious institutions' commercial enterprises that, on its face, cuts into core Establishment Clause values.

To be sure, the tax code may not provide the answer to the "religious" versus "secular" issue as to some non-profit activities of religious institutions.[10] But as to some of these the secular character of the activity will, again, be crystal-clear and not disputed. And as to others the answer will already have been determined because the obligation to comply with other federal employment statutes turns on whether the activity is secular

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[9] The Internal Revenue Service requires that organizations exempt under § 501(c)(3) must file returns respecting "unrelated" activities (apart from certain specifically enumerated activities which are excepted), even though they are non-profit, if such activities have gross receipts of $1,000 or more in the tax year. *See*, IRS Form 990-T and accompanying instructions; IRS Publication 598.

[10] As noted in footnote 9, *supra*, there are some activities excepted from the obligation to report respecting "unrelated" non-profit activities.

rather than religious. *See, e.g.*, 26 U.S.C. § 3309(b)(1)(B) (Federal Unemployment Tax Act); 26 U.S.C. § 203(s) and 29 C.F.R. § 779.214 (1984) (Fair Labor Standards Act). *And see, Tony and Susan Alamo Foundation, supra. See also*, the National Labor Relations Act, 29 U.S.C. §§ 151*ff* [11] and Title VII itself in its prohibition of discrimination based on race, sex and national origin.[12]

Taking into account the full range of federal law on the books there are, accordingly, few activities of religious institutions as to which the line-drawing the § 702 exemption is purportedly designed to obviate has not already been done. And, however large the category of

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[11] The NLRA does not contain any exemption for religious institutions, but the NLRB and the courts have had to distinguish religious from secular activities in order to determine the propriety of NLRA regulation in light of the Religion Clauses. *NLRB v. Catholic Bishop, supra; NLRB v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981); *Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302 (3rd Cir. 1982); *St. Elizabeth's Community Hospital v. NLRB*, 707 F.2d 1436 (9th Cir. 1983); *Denver Post of the Nat'l Soc'y of the Volunteers of America v. NLRB*, 732 F.2d 769 (10th Cir. 1984); *Volunteers of America-Minnesota v. NLRB*, 752 F.2d 345 (8th Cir.), *cert. denied*, 105 S.Ct. 3502 (1985); *NLRB v. Salvation Army of Mass.*, 763 F.2d 1 (1st Cir. 1985); *Volunteers of America-Los Angeles v. NLRB*, 777 F.2d 1386 (9th Cir. 1985). See also, *Catholic High School Ass'n v. Calvert*, 753 F.2d 1161 (2d Cir. 1985) (state labor relations board).

[12] The situation here is as in the case of the NLRA discussed in the preceding footnote. *See, e.g., McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *EEOC v. Pacific Press Pub. Ass'n.*, 676 F.2d 1272 (9th Cir. 1982); *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *cert. denied*, 106 S.Ct. 3333 (1986); *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *Ninth & O Street Baptist Church v. EEOC*, 616 F. Supp. 1231 (W.D.Ky. 1985), *aff'd mem.*, 802 F.2d 459 (6th Cir. 1986).

open cases may be, concerns about line-drawing cannot serve as the rationale for exempting all the *other* activities of religious institutions where the secular character is either undisputed or already established.

If Congress had been genuinely concerned about the marginal cases, it was open to the Legislature to provide safeguards in the statute—in the form of substantive benchmarks, presumptions, requirements that doubts be resolved in favor of the religious institution, limitations on discovery, etc.—to address those concerns. Indeed, this Court in making related decisions under the Religion Clauses has already articulated standards that are particularly sensitive to the interest in non-intrusion by government into religious affairs. The courts resolve cases implicating that interest without becoming "arbiters of scriptural interpretation," *Thomas v. Review Board*, 450 U.S. at 716, by confining their inquiries to the honesty of the claimed conviction, *id.*, and the "objectively ascertainable facts concerning the [] nature and scope" of the activities in question, *Tony and Susan Alamo Foundation*, 471 U.S. at 299.

It is doubtful, therefore, that the concerns for "entanglement" and "prophylaxis" would justify an exemption even for the marginal cases. But however such justifications might fare in determining the validity of a narrowly-drawn statute, there can be no doubt that these all but evanescent concerns do not provide a basis for the wholesale exemption of *all* secular activities of *all* religious institutions from Title VII's ban on employment discrimination. A blanket exemption to religious institutions as such without any secular justification for that exemption in the majority of its applications cannot, we submit, be squared with the Establishment Clause.

CONCLUSION

For the reasons stated above, the Court should declare § 702 as amended unconstitutional insofar as it extends its exemption to activities other than "religious activities".

Respectfully submitted,

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